Case No. 43604-3-II

COURT OF APPEALS, DIVISION II
FOR THE STATE OF WASHINGTON

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STATE OF WASHINGTON
BY _____
DEPUTY

TEAMSTERS LOCAL UNION NO. 117, and
PHYLLIS CHERRY,

Appellants,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS

Respondents.

BRIEF OF APPELLANT

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

I. ASSIGNMENTS OF ERROR AND RELATED ISSUES

Assignment of Error: The trial court erred when it affirmed the Public Employees Relations Commission's June 15, 2011, decision and denied the Petition for Review.

Issue No. 1: Whether the Public Employment Relations Commission erred in concluding that an employee's activity with other employees challenging the employer on an issue relating to working conditions is not protected activity under the State collective bargaining law, RCW 41.80, unless the communication is related to union activity, such as the negotiation or administration of a collective bargaining agreement.

Issue No. 2: Whether the activities of Phyllis Cherry that led to discipline and other adverse employment actions taken by the Washington State Department of Corrections against Ms. Cherry were protected activities under RCW 41.80.

II. STATEMENT OF THE CASE

A. Nature of Proceedings

Teamsters Local Union No. 117 ("Union") The Union and the Washington State Department of Corrections ("DOC" or "Employer") are parties to a Collective Bargaining Agreement covering DOC employees, including shop steward Phyllis Cherry ("Cherry"), under which a shop steward is permitted to use state equipment, including the internet/intranet, to communicate with union employees and administer the agreement.

Union member and shop steward Cherry filed an Unfair Labor Practice ("ULP") complaint with the Public Employment Relations Commission ("PERC" or the "Commission"), alleging that the DOC violated the State collective bargaining law, RCW 41.80, when it disciplined Cherry for sending out two (2) emails to other employees challenging the Employer on an issue relating to working conditions. Clerk's Papers ("CP") 5-10.

On February 8, 2011, Commission Examiner Philip Huang ruled in favor of the Union on the unfair labor practice complaint at issue in this proceeding. *State – Corrections,* Decision 10998 (PSRA, 2011). CP 494-516. The agency action at issue is PERC's reversal of Decision 10998, which ignored the Examiner's factual findings, reversed Examiner

Huang's decision, and reinstated the reprimand letter in Cherry's personnel file.

The Union and Cherry appealed PERC's ruling to the Pierce County Superior Court and on May 25, 2012, Judge Linda C.J. Lee affirmed PERC's reversal of Decision 10998. Judge Lee held that an employee's e-mail communication with other employees challenging the employer on an issue relating to working conditions is not protected activity under RCW 41.80 unless the communication is related to union activity, such as the negotiation or administration of a collective bargaining agreement. (Order Denying Petition for Review, *Teamsters Local 117 and Cherry v. Washington State Dept. of Corrections and PERC*, Peirce County Cause No. 11-2-11257-3). *See Appendix A.*

In essence, Judge Leeheld that the right to self-organization protected under RCW 41.80.050 ends once a group of employees are represented by a union. The Trial Court's ruling ignores the reality that self-organization is an ongoing process that is not solely tied to the process of obtaining PERC certification for a bargaining representative. The Union appealed Judge Lee's ruling on June 15, 2012, and respectfully requests that this Court reverse the Trial Court's ruling and PERC and hold that RCW 41.80.050 protects employees who are engaged in collective action related to their working conditions.

B. Statement of Facts

1. Officer Cherry Is And Was A "Very Active" Shop Steward, Union Representative, And Union Leader, And Is And Was Recognized As Such By Coworkers And Management.

Cherry is, and at all relevant times was, a "very active" shop steward. CP 625, 686. In addition to being a shop steward, she is a member of the Union's Steward Advisory Council, was on the Union's communication committee and served on the Union's negotiating committee. *Id.* As a result, Officer Cherry is correctly recognized by fellow officers as a "strong advocate," a union leader, and somebody who "knows exactly what is going on." CP 615-616.

Sometimes strong advocates are perceived as a threat to management. CP 616. This is certainly the case with respect to Officer Cherry. She was perceived by management as a strong and effective advocate for employees. CP 738-740. Yet, this sometimes put her at odds with DOC management. For example, after management at Washington Corrections Center for Women ("WCCW") had improperly mandated staff to attend in-service training on a shift that is not adjacent to the employee's regular shift, Officer Cherry intervened. CP 625-626. Officer Cherry persuaded one such DOC manager, Margaret Gilbert, that she could not mandate employees to in-service training in this way. After

the issue had been favorably resolved for the affected employees, Ms. Gilbert shouted into a public area, "you won again Cherry." CP 626.

Similarly, Officer Cherry was an advocate for employees regarding sick leave usage. When the Department challenged Officer Cherry on her own use of sick leave, even though that leave was consistent with Department policies and the collective bargaining agreement, Officer Cherry not only fought for herself, but for all ten (10) affected employees. CP 627. After the issue was resolved favorably for the affected employees, Ms. Gilbert again yelled, "you won again, Cherry."

Management was therefore placing Officer Cherry in the position of an adversary, and demonstrated that they perceived her as adverse to management interests. As Officer Cherry testified: "So the perception was there was a win/lose category I was being placed in. I win or I lose. And she would yell, "you won again." CP 627.

On cross-examination during the unfair labor practice hearing, Superintendent Douglas Cole acknowledged—as he must—that Union interests are sometimes adverse to those of management, and that inherent in the shop steward role is some element of disagreement or conflict with management. CP 740. As Officer Cherry became more and more of a Union leader at WCCW, she was viewed more and more by management as a challenge and threat to their authority.

2. Officer Cherry Emails Staff Regarding The Hiring Of A Victim Advocate At WCCW.

In August of 2009, Officer Cherry noticed on the Inside DOC website that there was a Daily Communiqué indicating that Former State Senator Jeralita Costa had been appointed as a victim advocate. CP 627, and 324-325. Officer Cherry followed a link to an article from the Tacoma News Tribune which had additional information about the hire, including the annual salary of $57,240. CP 629 and 326-327. Officer Cherry then forwarded an email to custody staff notifying them of this hire. CP 630, and 328. The entire text of the August 10, 2009, e-mail that Officer Cherry sent to custody staff reads as follows:

> For your information:
>
> WCCW will be getting a new staff by the name of Jeralita Costa...former state Senator to be the inmate advocate for victims of staff sexual misconduct. And of course, look at her salary to be an advocate for inmates.
>
> Phyllis Cherry.

CP 328.

The subject line of the e-mail is, "Thought everyone should see this." Officer Cherry felt that it was important for all custody staff to be aware of this hire since it applied directly to WCCW, and since it involved the hiring of a former State Senator to be a victim advocate during a time

when WCCW (and the entire prison system) was under a severe financial crunch. CP 631-632.

Captain Michael Green called Officer Cherry into his office and stated that she had sent an "unprofessional email." Officer Cherry had reviewed the DOC Ethics Policy (CP 335-338), the DOC Acceptable Use of Technology Policy (CP 339-346), and DOC Secretary Eldon Vail's memorandum regarding the Use of DOC Internet Access (CP 347-348), but could not find anything improper about sending the email that she sent. CP 632-635. She pressed Captain Green on this point, but he could not identify a specific violation of policy, and would only say that the email was "unprofessional." CP 632-633.

After her meeting with Captain Green, she was not assigned to home, was never spoken to further about the August 10 email, was never told that she was the subject of an ongoing investigation, and had no knowledge that any further action was being taken with respect to the email she had sent. CP 636-637. Time passed without incident or further discussion about the August, 2009 email.

3. Officer Cherry Emails Staff Regarding The "If" Project.

Officer Cherry first learned about the "If" Project from talking with WCCW offenders on October 12, 2009. As of that date, the program had already been in place for about a year and a half. CP 637.

Officer Cherry then sent an email from her home to her DOC email address. CP 638 and 352. Later that same day, Officer Cherry also sent an email to the process owner of the If Project, Kim Bogucki. CP 639 and 353. Ms. Bogucki responded to the email that evening. CP 639 and 354-355. As is evident from the email exchange, Officer Cherry supported the project, and she and Ms. Bogucki had a very positive interaction about the nature of the project. *See generally:* (CP 352, 353 and 641).

On October 15, 2010, Officer Cherry emailed all custody staff at WCCW regarding the If Project. CP 640 and 356. Officer Cherry believed that it was important to share information about the If Project with custody staff at WCCW because it was a project that was initiated at WCCW but no one had heard about it. In addition, Officer Cherry was impressed because it sought to support offenders as potential agents of change (for themselves and others in the community) rather than as victims. CP 641-642. Officer Cherry therefore viewed the philosophy espoused in the WCCW sensitivity class as "extremely inconsistent" with the If Project philosophy, and she pointed out that inconsistency in her email. CP 643-644. The full text of the email reads as follows:

> Check this out!!!
>
> Now tell me why we are being sensitive when they have projects like this going on. Inmates telling their stories as to how they made bad choices and ways to change their

> lives. Inmates are trying to help others by telling that if they had whatever....things could've been different.
>
> However, we are to be sensitive to their needs...with that sensitivity class!!!!!
>
> This was filmed inside WCCW with several of the current inmates...even a person sentenced to life!!!!!
>
> Phyllis Cherry

CP 352, 356.

Within 30 minutes of sending the email, Margaret Gilbert met with Officer Cherry about the email. CP 645-647. Officer Cherry explained to Ms. Gilbert the comparison of the different philosophies behind the If Project and the sensitivity class, and Ms. Gilbert indicated that she understood, so Officer Cherry thought that the issue was resolved. CP 646.

4. DOC Management Immediately And Impulsively Removes Officer Cherry's Internet Access, Cutting Her Off From Fulfilling Her Steward Role And Sending A Chilling Anti-Union Message To Bargaining Unit Employees.

On her next work day, Officer Cherry could not access the internet or her email. CP 645. She had been entirely cut off from DOC internet access and email without any conversation or notification about the issue. *Id.* CP 357-358. Moreover, the Department made the decision to revoke Officer Cherry's internet and network access despite the fact that there

was no basis for such revocation under the Department's own policies. CP 329-334, 359-360. Specifically, the guideline provides that:

> the main criterion for removing access is a determination that continued access to the network resources by the suspected abuser **poses an immediate threat to the Department.** This may occur under a variety of scenarios, including, but not limited to, the investigation that the user has accessed pornography, or has been subject to offender compromise, or upon discovery of contraband data or software, discovery of rogue equipment a discovery of a backdoor into the network, or unauthorized access to data.

CP 359-360 *(emphasis added)*. It is undisputed that none of the scenario examples—or anything analogous—was present in this case. CP 750-751. In fact, on cross-examination, Superintendent Cole testified that the reason he removed the access from Officer Cherry was not because there was any immediate threat to the Department as required by Exhibit 15 (CP 359-360), but simply to prevent Officer Cherry from sending out more emails to staff with information and/or opinions that Superintendent Cole regarded as controversial. CP 751-752. In addition, the access was denied for nearly four months, from mid-October of 2009 until early February, 2010. CP 652-655 and 361-364.

The unwarranted removal of internet and network access had a significant and detrimental impact on Officer Cherry's ability to do her job both as a corrections officer and as a union shop steward, and it impacted her emotionally because it undermined her reputation and sense of self.

CP 647-651. She was denied access to policies, procedures and updates and was out of the information and communication loop. CP 680-682. She was also denied access to critical pass down information, incident reports, and other elements that are critical to effective performance of the job of correctional officer and to maintaining safety and security in the institution. CP 681-682. Literally overnight, the Employer had transformed Officer Cherry into a *persona non grata*. As Officer Cherry testified:

> It was just demoralizing. It was totally demoralizing. . . . I could not apply for a job. I could not print out my pay stub at home. I couldn't do anything related to Department of Corrections, corrections officer, crisis negotiator, shop steward, Phyllis Cherry. I could not do anything. I could only show up for work, and I showed up for work.
>
> The emotional impact is that it was totally demoralizing that the staff had to approach me. First of all, I had staff stating that I was fired. They didn't see me on my weekend. I come back, statements were I was fired. There were jokes going around every day, oh I can't contact you. Oh, you don't have e-mail access, oh – you know, constant. And this went on from October to February, still asking me can I email you, you know. It was just completely demoralizing, trying to be the person that I am at the institution.
>
> I'm a professional. I am a professional and I cannot be a professional if I cannot perform my job. And I cannot perform my job when I have no access to a policy. . . . So it's completely demoralizing to not be able to do what you were hired to do.

CP 648-649.

The Department's impulsive and retaliatory decision to sever Officer Cherry's ability to communicate with coworkers carried an anti-union message that was felt by bargaining unit employees as well. The message was clear: if you are active in supporting the Union and express opinions contrary to those of management, you run the risk of being excommunicated.

Shop stewards in general—and Officer Cherry in particular—bridge the communication gap between administration and custody employees that work at the facilities. CP 613-614. It is for this reason that Officer Jamie Redd testified that it was important to her to familiarize herself with the shop steward when she moved to Washington Correction Center for Women in November of 2009. CP 613. However, when she arrived, she was told to "be careful" because the shop steward was in trouble. Officer Cherry had become a pariah.

In addition, employees at WCCW—especially those on first shift—were left without direct access to Officer Cherry, on whom they had come to rely for Union support, information and advice. Employees on first shift at WCCW work from approximately 9:30 p.m. to 6:00 a.m. and therefore do not have direct contact with administration, so "our shop stewards are pretty much our only line of communication for any issues

that we come across in the institution." (*Brown)* CP 603. Accordingly, it is a "big deal" for employees to know who their shop stewards are so they know who to contact if they have an issue. *Id.* Officer Cherry in particular established herself as a shop steward with answers and with the ability to get answers if she didn't have them. CP 605-606. Her role was so critical to the morale of employees on first shift that Officer Brown went so far as to testify that: "she's our communication to our lieutenants, to our CUS's, to any administration. All we have is her when we have questions or issues. So it's important to have her there and it's – it's frustrating when you don't have that." CP 606.

In the Fall of 2009, Officer Brown had an issue of concern regarding the close observation area and the rules as to which officers could staff this area. Officer Brown had a concern about safety because the Department was staffing the area with inexperienced intermittent employees. CP 604. Officer Brown emailed Officer Cherry as her shop steward to get clarification on the issue. The issue continued to be a concern in October of 2009, but Officer Brown could not reach Shop Steward Cherry through email, and the inability to reach her during this time caused frustration and concern. CP 604-605. As Officer Brown testified, "now we've got this filter, which is bad because everyone should be able to go right to her, or contact her and say, hey this is my issue. But

we couldn't contact her." CP 605. Officer Brown testified that the inability to contact Officer Cherry as the shop steward impaired communication, and undermined the perceived professionalism of the Union representation. CP 605. As she correctly testified: "we should have the right to be able to talk to her." *Id.*

Officer Redd testified that she had an overtime issue that she wanted to address proactively. CP 614. She couldn't email Officer Cherry so she had to go visit Officer Cherry physically, which took additional time and was nerve-wracking for Officer Redd. CP 615. Being cut off from her shop steward affected the Union's ability to communicate effectively with members about issues important to them. *Id.*

The impact of cutting Officer Cherry off from email access had a significant impact on bargaining unit employees. Employees began to sense that the administration did not care because "they're cutting off my communication with my shop steward. It feeds the rumor that admin doesn't appreciate your shop steward. . .You hear the rumor that they prevent our shop stewards from coming in and talking to us. And sure enough, our shop stewards can't come in and talk to us." CP 607.

Superintendent Cole knew that this would be a consequence of his decision to cut off Officer Cherry's internet and email access. Superintendent Cole was a participant in the 2004 contract negotiations,

when the Union emphasized to DOC that shop steward access to the members through the DOC email system was of critical importance to the Union as a means of maintaining communication. CP 738-739. This is why the parties bargained that protection into Article 6 of the collective bargaining agreement. CP 738-739. Superintendent Cole further understood that at WCCW, cutting Officer Cherry off from email access would significantly impair the Union's ability to conduct business with its membership because she was so central to the Union and the members, a point emphasized by Ms. Moroffko in an e-mail to Superintendent Cole. CP 739-740, and 370.

By contrast, Officer Cherry's emails had no discernible impact on Department operations. CP 748-750. Superintendent Cole testified that there were some complaints about the email but "no one claiming to result in mental health concerns related to it." CP 749. He further testified that there were some questions raised regarding the victim advocate that were resolved and some generalized resistance to the training that was overcome and that may or may not have been the result of the email. CP 749-750. In short, the evidence in the record does not support any conclusion that Officer Cherry's email had any tangible effect on management's ability to run the WCCW operation.

5. DOC Management Issues A Letter Of Reprimand To Officer Cherry.

On December 2, 2009, Superintendent Cole issued a letter of reprimand to Officer Cherry for sending an "unprofessional email" to all custody staff on two occasions. CP 376-378. In the letter of reprimand, Superintendent Cole emphasized his concern that the email "gave the impression that it was also the Department of Corrections' opinion as well." CP 378. However, on cross-examination, Superintendent Cole acknowledged that the email only expressed her personal views, and did not purport to express the views of DOC. CP 743-744.

Critically, in the letter of reprimand, Superintendent Cole emphasized Officer Cherry's role as a shop steward. CP 378. The inclusion of this reference not only demonstrates management's knowledge of Officer Cherry's role, but it also unequivocally expresses a desire to control or influence the activities of a shop steward in that capacity.

The letter of reprimand purported to grant reinstatement of Officer Cherry's internet and email access rights effective December 3, 2009. CP 378. However, the evidence establishes that the access rights were not restored until two months later, on February 2, 2010. CP 364. This process is entirely in the control of DOC management and can only be

initiated by the Superintendent. CP 702-703. Between October 2009 and February 2010, employees did not have internet/intranet access to contact their union steward.

Cherry was authorized under the contract and pursuant to her rights under RCW 41.80 to send informative e-mails updating employees on policies and procedures to bargaining unit members on a regular basis, which she regularly did. The two (2) emails at issue in this case were sent in her capacity as a shop steward as part of her ongoing duties to advocate on behalf of Union members and to keep members informed about issues that may impact working conditions.

III. ARGUMENT

1. This Court Reviews The Commission's Legal Conclusions *De Novo*, Applying The "Error of Law" Standard.

The Appellate Court stands "in the same position as the superior court when reviewing an administrative decision." *Swoboda v. Town of La Conner*, 97 Wash.App. 613, 617, 987 P.2d 103 (1999), *review denied*, 140 Wash.2d 1014, 5 P.3d 9 (2000), and applies "the appropriate standard of review directly to the administrative record." *Boehm v. City of Vancouver*, 111 Wash. App. 711, 716, 47 P.3d 137, 141 (2002) (citing *Wilson v. Employment Sec. Dep't*, 87 Wash.App. 197, 200, 940 P.2d 269 (1997). The Washington Supreme Court has held that "PERC's decisions in unfair

labor practice cases are reviewable under the standards set forth in the Administrative Procedure Act." *City of Pasco v. Public Employment Relations Commission*, 119 Wash.2d 504, 506, 833 P.2d 381 (1992); *Public Employment Relations Commission v. Kennewick*, 99 Wash.2d 832, 841-842, 664 P.2d 1240 (1983). Accordingly, when PERC dismisses an unfair labor practice complaint, the decision is reviewed under the "error of law" standard. *City of Pasco*, 119 Wn.2d at 507. Under this standard, relief from PERC's decision should be granted if "the agency has erroneously interpreted or applied the law." *Id.; RCW 34.05.570(3)(d).* As part of this review involves questions of law, the Court conducts its review on a *de novo* basis. *City of Pasco*, 119 Wn.2d at 507.

The Commission's findings of fact are properly reviewed by this Court to determine whether they are supported by "substantial evidence in light of the whole record, *i.e.*, evidence sufficient to persuade a fair-minded person of their truth." *City of Federal Way v. Public Employment Relations Commission*, 93 Wash.App. 509, 970 P.2d 752 (1998). The Commission is entitled to substitute its findings for those of its Examiner, but the Commission is also required to give considerable weight to the factual findings and inferences, including credibility determinations, made by its Examiners. *Cowlitz County*, Decision 7210-A (PECB, 2001). In this case, the Commission has overturned its Examiner's findings, and this

Court should review the entire record in light of the presumption that the Examiner's findings are correct.

2. The Superior Court Erred In Concluding That The Right To Self-Organization Ends With PERC Certification.

The Union's position in this case is simple. Cherry acted in her capacity as a Union shop steward when she sent out two (2) emails critical of the DOC which focused on working conditions that were of interest to her fellow employees and Union members. Those emails were not officially sanctioned by the Union as an organization. They were not specifically tied to contract negotiations or grievance processing. Nevertheless, they were sent out by an active Union member in her role as shop steward advocating for her coworkers on issues related to working conditions.

Unions as organizations often lead their members and decide through union leadership which issues will be at the forefront of any negotiations or battles with the relevant employer. Just as often, however, it is the members that lead the Union. Unions are by nature grassroots membership driven organizations. When an issue becomes important to the membership, it often later becomes part of the official union platform. Moreover, the membership sometimes becomes dissatisfied with its representatives. Employees who are already organized have the right to

decertify and chose a different union, or no union at all. Surely such actions are part of the ongoing process of self-organization. Cherry's emails were in essence from the Union as she was indeed the face and voice of the Union at her institution.

Judge Lee, in her oral decision affirming the Commission, noted what she called a fundamental flaw with the Union's argument that Cherry was engaged in self-organization protected under RCW 41.80.050. Judge Lee noted that the DOC employees were "already organized" and therefore "[t]hese e-mails were not and cannot be characterized, given their contents, as an attempt to self-organize." *Verbatim Transcript of Proceedings*, May 11, 2012, Page 3, Peirce County Cause No. 11-2-11257. *See Appendix B.*

Judge Lee's ruling ignores the reality that self-organization is an ongoing process that is not solely tied to the process of obtaining PERC certification for a bargaining representative. Cherry was organizing around an issue of major importance for the Union membership, namely the staffing and program changes that were being implemented at the time in response to a sexual assault lawsuit brought against the DOC on behalf of female inmates. These changes included what the officers referred to as "sensitivity training" and also included serious changes to which posts could be staffed by male or female officers and which could only be

staffed by female officers. Moreover, the Union and the DOC have a very mature collective bargaining relationship stretching back many years and over many agreements. Budgetary constraints are often at issue and every dollar the DOC spends on something other than its employees is a dollar that is taken out of the proverbial pot during contract negotiations. Cherry's emails pointed out how the DOC was spending money and criticized a certain mandatory training program. Nothing could be more relevant to the bargaining unit's interest than such issues. These are the very sorts of things employees self-organize around. Nevertheless, the Court held that because the DOC employees were already organized and represented by the Teamsters Union, any self-organization was only in their past.

3. The Superior Court Erred In Concluding That The Union's Argument Would Protect Any Employee Activity.

The Superior Court noted that "the mere fact that a person is a shop steward does not make all activity engaged in by that person protected activity." *Verbatim Transcript of Proceedings*, May 11, 2012, Page 3, Peirce County Cause No. 11-2-11257. The Union has never taken such a position. Judge Lee apparently misunderstood the Union's fundamental argument in this case.

> Also, it strikes this Court that the appellant's argument places the statute on its head. The

> appellant argues that the Court should hold that RCW 41.80.050 does not deprive the employees of protection simply because the activity is not connected to union activity. In other words, any activity by an employee must be protected because whether the activity is related or connected to the union activity or not, it should be protected. If that's the case, why have the statute at all, because all employees would be afforded protection for any activity, period. To me that seems illogical.

Verbatim Transcript of Proceedings, May 11, 2012, Page 5, Pierce County Cause No. 11-2-11257.

That is not what the Union argued. The issue is not whether RCW 41.80 protects any activity an employee may engage in regardless of whether there is a union nexus. The issue is whether the specific activity at issue in any given case is, in fact, related to union activity. That is a question of fact for PERC to decide, which in this case the hearing examiner decided in favor of the Union. The activity that Cherry engaged in was sending out emails to her coworkers that related to staffing and workplace issues that directly impacted the bargaining unit. Although the emails were not sent directly from the Union, and were not directly related to a specific grievance or current contract negotiations, the emails did bring attention to an issue that was important to the bargaining unit. Accordingly, the protections of RCW 41.80 should have prevented the

Employer from taking adverse employment action against Cherry for sending those out in her role as shop steward.

It is not because she is an employee, or even a shop steward, that her actions should have been afforded the protection of the law. It is because the emails she sent were intended to inform her coworkers about an issue that impacted working conditions and was part of her role as the face and voice of the Union. The Superior Court reasoned that if Cherry had decided that she didn't like a coworker and wanted to dig up dirt on that coworker and disseminate it on the DOC email system, the Union's position would bring such activity under the purview of the statute. *Verbatim Transcript of Proceedings*, May 11, 2012, Page 6, Pierce County Cause No. 11-2-11257. Nothing could be further from the truth. Activity like that has nothing to do with the Union or its mission. A shop steward can engage in all sorts of activities that fall far outside the scope of the work he or she does for a union. In the hypothetical posed by Judge Lee, Cherry could be appropriately disciplined for misuse of the DOC's email system. In reality, that is not what happened. Cherry was disciplined for engaging in ongoing self-organizing over an issue that impacted the bargaining unit and should have been protected under RCW 41.80.

4. The Commission Erred In Concluding That Employee Concerted Activity Is Not Protected Unless There Is A Nexus To Union Activity.

The Commission's entire decision rests on the conclusion that "Cherry's e-mails were not protected activity." CP 578. In fact, having held that Cherry's e-mails were unprotected, the Commission undertook no further analysis: "it is unnecessary to determine if the employer's acts interfered with Cherry's protected rights." *Id.*

The Commission held that Cherry's e-mail communications were not protected activity under RCW 41.80 because they were not connected to union contract negotiation or administration. *Id.* Specifically, the Commission held that: "Neither of Cherry's emails concern the administration of a provision of the collective bargaining agreement, and no evidence was presented demonstrating that the emails were related to negotiations or preparation for negotiations between Teamsters 117 and the employer. Therefore, Cherry failed to prove that either email was protected by statute." CP 577. Yet, there is no requirement in RCW 49.80.050 that the employee activity be linked to union activity, let alone to "administration of a provision of the collective bargaining agreement," or "negotiations," in order to trigger statutory protection. The

Commission's conclusion therefore contradicts the plain language of the statute and is wrong as a matter of law.

It is well-established that federal law protects private sector employees that engage in concerted activity, even if there is no nexus to union activity, or in fact, no union presence at all. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 82 S. Ct. 1099, 8 L.Ed.2d 298 (1962); *Halstead Metal Products v. NLRB*, 940 F.2d 66, 69 (4th Cir. 1991); *Meyers Industries*, 281 NLRB 882, 123 LRRM 1137 (1984), *affirmed*, *Prill v. NLRB*, 835 F.2d 1481 (C.A.D.C. 1987), *cert. den.*, 487 U.S. 1205 (1988); *Gold Coast Restaurant Corp.*, 304 NLRB No. 96, 139 LRRM 1256, *enforced*, 143 LRRM 2505 (C.A.D.C. 1993).

It is also well-established that the state collective bargaining laws are "similar to the National Labor Relations Act (NLRA) and, while not controlling, decisions construing the NLRA are generally persuasive in interpreting state labor laws that are **similar to or based upon the NLRA**." *Snohomish County PUD*, Decision 8727-A (PECB, 2006) (emphasis added); *Nucleonics Alliance v. WPPSS*, 101 Wash.2d 24, 677 P.2d 108 (1981). The State collective bargaining laws, including RCW 41.80, are indisputably similar to and based upon the NLRA.

Nevertheless, the Commission has declined to apply the federal rulings, holding that the absence of concerted activity language in the

State collective bargaining statute "must be judged as intentional." *Seattle School District*, Decision 5237-B (EDUC, 1996); *Spokane Transit Authority*, Decision 2078-A (PECB, 1985). In other words, the Commission reasons that because the State Legislature did not specifically adopt language protecting "concerted activity," it must be inferred that the Legislature intended to leave such activity unprotected. In the *Seattle School District* case, for example, the Commission held that, "concerted activities for . . . mutual aid or protection is [sic] not, per se, protected under the Act." *Seattle School District*, Decision 5237-B (EDUC, 1996).

It is true that the State collective bargaining statutes, including the Personnel System Reform Act ("PSRA") at issue here, do not expressly use the term "concerted activities" in defining the scope of protection afforded to employees. However, the language in the PSRA is broad enough to contemplate a legislative intent to safeguard employees that seek to invoke their right to collective action as a means of self-organization:

> Except as may be specifically limited by this chapter, employees shall have the right to self-organization, to form, join, or assist employee organizations, and to bargain collectively through representatives of their own choosing for the purpose of collective bargaining free from interference, restraint or coercion. . . .

RCW 41.80.050. The PSRA, and this language in particular, serves an important remedial purpose, which is to protect State employees from interference, restraint or coercion by their employer when they exercise their rights to self-organization and collective bargaining, and the language should therefore be broadly construed to affect its purpose. *See: City of Bellevue v. International Association of Firefighters, Local 1604*, 119 Wash.2d 373, 379, 831 P.2d 738 (1992); *PUD No. 1 v. Public Employment Relations Commission*, 110 Wash.2d 114, 119, 750 P.2d 1240 (1988); *Nucleonics Alliance v. WPPSS*, 101 Wash.2d 24, 677 P.2d 108 (1981).

The Washington Supreme Court has repeatedly held that a liberal construction of remedial statutes requires that "the coverage of an act's provisions be liberally construed and that its exceptions be narrowly confined." *Nucleonics Alliance v. WPPSS*, 101 Wash.2d 24, 29, 677 P.2d 108 (1981); *Hearst Corp. v. Hoppe*, 90 Wash.2d 123, 138, 580 P.2d 246 (1978); *Mead School District v. Mead Education Association*, 85 Wash.2d 140, 145, 530 P.2d 302 (1975). Given this clear and consistently reiterated mandate from the Washington Supreme Court, it is error for the Commission—and the Superior Court—to read the statutory language narrowly so as to permit employer interference, restraint and coercion when employees engage in concerted activity that is not done to assist a

labor organization. This is a highly technical reading of the statute that is entirely inconsistent with its purpose, contrary to the direction of the Washington Supreme Court. *Nucleonics Alliance v. WPPSS*, 101 Wash.2d 24, 29, 677 P.2d 108 (1981); *International Association of Firefighters, Local 469 v. Yakima*, 91 Wash.2d 101, 109, 587 P.2d 165 (1978); *Roza Irrigation District v. State*, 80 Wash.2d 633, 639, 497 P.2d 166 (1972).

To be meaningful, the right to self-organization must carry with it the right to engage (or not engage) in concerted activity, even if that activity is not aligned with the institutional interest of a particular union. Expressed differently, when employees engage in concerted activity by communicating with other employees on issues of concern regarding working conditions, the activity is an expression of the "right to self-organization" because such dialogue builds employee solidarity and thereby strengthens the bargaining unit as against employer interests. This is true regardless of whether or not a union is involved in the dialogue.

The case before the Court illustrates this point. Cherry identified an issue of concern relating to the expenditure of State resources on certain programs, and she then communicated her views to her co-workers. To conclude that Cherry's activity is unprotected because the Union had not yet taken action on the issues she was addressing would be to permit the employer to stifle the discussion in its infancy, a result which

is anathema to the idea of protecting the rights of employees to engage in a meaningful dialogue on workplace issues, or "self-organization."

This case also highlights why the Court should reject the Commission's reasoning and rule—because it results in an anomalous and arbitrary result. If the Commission's decision is affirmed, State and other municipal employers will be free to threaten, intimidate, discipline and interfere with employees who seek to engage in collective action to address workplace issues, unless the employee's action can be linked to union activity. In other words, it is only when employees support a union's institutional goals that they will garner the protected right to engage in concerted activity. This is a result that would significantly limit the employees' "right to self-organization," a right that the statute expressly seeks to protect pursuant to RCW 49.80.050.

It is likely for this reason that the Commission has started to erode its own rule through the development of a body of cases that suggest that even a tenuous connection to assisting the union is sufficient to trigger the statutory protection. *Renton Technical College*, Decision 7441-A (CCOL, 2002), *Clallam County*, Decision 4011 (PECB, 1996). For the reasons noted below, the Commission failed to distinguish these cases from the case at issue here, and Cherry's communications are inextricably linked with her union activity. Importantly though, there are many situations in

which employees exercise their right to engage in concerted activity to promote self-organization even though there is no corresponding union activity, and those employees should not be deprived of statutory protection from employer interference. Instead of leaving PERC to slowly erode an unworkable and anomalous rule, this Court should overturn the Decision and hold that RCW 41.80.050 does not deprive employees of protection simply because their activity is not connected to union activity.

This Court is the "proper body to determine the construction and interpretation of statutes. Thus, even when the court's interpretation is contrary to that of an agency charged with carrying out the law, it is ultimately for the courts to declare the law and the effect of the statute." *Nucleonics Alliance v. WPPSS*, 101 Wash.2d 24, 29, 677 P.2d 108 (1981); *Hearst Corp. v. Hoppe*, 90 Wash.2d 123, 130, 580 P.2d 246 (1978). Overturning the Commission's interpretation of the statute would do no more than effectuate the remedial purpose of the statute and bring State law into alignment with the well-established federal rule applicable to private sector employees.

5. The Overwhelming Evidence In The Record Establishes That Cherry's Email Communications To Employees Were Inextricably Linked To Her Role As Steward And Were A Part Of Her Overall Effort To Assist Local 117.

Even if the Court declines to overrule the Commission's interpretation of the statute, the Commission's Decision in this case should still be reversed because on the record before the court, the weight of evidence supports the conclusion that Cherry's activity was connected to union activity. The Commission has repeatedly held that employee activity is protected if there is even a slight connection to union activity. *Renton Technical College*, Decision 7441-A (CCOL, 2002), *Clallam County*, Decision 4011 (PECB, 1996). The Examiner properly relied on these decisions in holding that Cherry's emails, given her well-established role as an effective shop steward and employee advocate, were sufficiently linked to union activity to trigger statutory protection. The Commission struggled to distinguish these cases. CP 577. Yet, Cherry's activity in sending the emails, and the Employer's heavy-handed response, were no more removed from union activity than the action and reaction that occurred in the *Renton Technical College* case (employee asked a legislator about a possible funding source) or the *Clallam County* case (employee simply referred to the workplace as a "feudal empire").

In fact, the *Clallam County* case illustrates the absurdity of the Commission's rule. In that case, the Commission held that the employee's reference to the workplace as a feudal empire was sufficiently linked to union activity because at the time the Union was engaged in contentious contract negotiations with the employer. In this case, by contrast, the Commission held that Cherry's critiques of her employer's programs were insufficiently linked to union activity despite the record that established her well-recognized role as a shop steward and internal union organizer. Thus, whether a particular activity will be regarded as protected or unprotected by PERC will depend not on the nature of the activity or the employee's status as an advocate, but on factors entirely outside the employee's control.

Cherry's emails are expressions of opinion which directly challenge the authority of the employer (and which were correctly perceived by the Employer as a challenge to its authority). Cherry challenged the appointment of a victim advocate and the implementation of new training, as both involved a significant cost to the Department during an economic downturn that Cherry believed was unnecessary. These communications related to the working conditions of bargaining unit employees, and Cherry's action in sending them assisted the Union

that she represented, and furthered Cherry's right to engage in self-organization with her co-workers.

The Commission did not "give substantial weight to" the findings of the Examiner here, but instead ignored those findings which were based on an overwhelming weight of evidence in the record that the State Department of Corrections interfered with Cherry's rights by disciplining her for her communications that criticized the Employer for incurring additional expenses during a budget crisis. Deferral to the Examiner's findings is especially appropriate here, given the Commission's recent decision in the *University of Washington* case that summarized the highly fact-intensive inquiry that is required:

> No bright line exists, however, in deciding when statements by employee/union agents are protected, and when an employer interferes with employee rights by taking action in response to those statements. It is the context of both the statements and the response that determines whether the employer interfered with employee rights.

University of Washington, Decision 9633 at 3-4. In that case, the hearing examiner had regard to three contextual aspects: (1) the nature of the dispute; (2) the actions and words of the parties; and (3) the employer's response. *Id.*

In this case, the central role of Cherry as a critical, outspoken and effective union advocate at WCCW is also essential in evaluating both the

discrimination and the interference claims. This is an important factor because of the admonition in Commission precedent that the outcome of interference claims turn on the **reasonable perception** of employees, not on the actual intent or motivation of the employer. One factor in determining whether Cherry and her fellow employees reasonably perceived the Department's reaction to her emails as a reprisal for her well-established union activism is the extent to which she was recognized as a union leader. The evidence in the record on this point is overwhelming. Cherry was in fact central to the Union's representation at her institution, she was the undisputed Union leader at the institution, and she was perceived by management and employees as the face and embodiment of the Union.

As to the three factors considered by the Hearing Examiner in the *University of Washington* case, these also support the conclusion that the Employer interfered with employee rights. The nature of the dispute in this case related to core matters of concern to bargaining unit employees; namely, the expenditure of Department resources, required training for bargaining unit employees, and the approach taken by management in defining the relationship between bargaining unit employees and the inmates they oversee and supervise. The Examiner correctly concluded that "her comments were clearly made . . . in the interests of bargaining

unit employees and not in her individual interest." CP 500. The issues in both emails "affect the bargaining unit as a whole," not just Cherry. *Id.* The overwhelming evidence in the record also establishes that:

- Cherry was an effective advocate for employee interests, engaging in protected, concerted activity (CP 615-616, 625-627, 686, 738-740);
- Cherry was perceived by employees and management alike as the Union's lynchpin in terms of the communication and distribution of information (CP 623-625, 686-687, 739-740);
- The removal of Cherry's internet access and her letter of reprimand had a chilling effect on her and other members of the bargaining unit regarding the Union's effectiveness and the consequences of engaging in Union activity. (CP 603-607, 613-615, 647-651, 680-682).

Accordingly, the Examiner's decision inferring a connection between Cherry's protected activities and the Employer's denial of internet access and reprimand was reasonable and well-supported by the evidence in the record. The Commission's conclusion to the contrary is not.

The Commission seeks to separate Cherry's undisputed role as an active and well-known union leader who was constantly engaged in protected activity from the particular emails that she sent that triggered the Department's removal of her internet access and letter of reprimand. This approach is not supported by the Commission's own jurisprudence. In prior cases, the Commission has ruled that "hostility against an employee

who engages in protected activities (and is perceived as challenging the authority of the employer) does not end just because the particular issue involved is resolved or becomes moot." *See:* CP 499 - Examiner Decision at 6 *citing Renton Technical College*, Decision 7441-A (CCOL, 2002).

Finally, and perhaps most critically, in issuing the letter of reprimand, the Employer expressly viewed Cherry's emails as actions taken in her role "as a shop steward." CP 378. Given this, it is surprising that the Commission now concludes that the emails do not constitute protected activity.

6. Cherry's Challenge Of Management Was Not Unreasonable And The Employer Therefore Discriminated Against Cherry Based On Her Protected Activity.

Although the Commission did not take issue with the Examiner's finding regarding the reasonableness of Cherry's activity in criticizing her employer, it is important to reiterate that while not all concerted activity is protected even under the federal law analogue, the content of Cherry's emails was certainly well within the bounds of reasonableness. The Commission and the Washington appellate courts have applied a reasonableness test to govern union activity. *Examiner's Decision at 12 citing Vancouver School District v. SEIU, Local 92*, 79 Wn. App. 905

(1995); *State v. Fox*, 82 Wn.2d 289 (1973). The Examiner properly concluded that Cherry's statements—while "impolitic" and challenging towards management—do not rise to the level of unreasonableness.

The Commission does not challenge or overturn this conclusion. This is because the actions and words used by Cherry were not unreasonable. Unlike many of the cases reviewed by the NLRB and PERC, the language used by Cherry was not hostile or profane. At the most, it could be said that the language used raised questions about the propriety of management action, yet this is precisely what is expected of a shop steward as a union representative.

The Examiner's decision thoroughly and properly analyzes the reasonableness of Cherry's challenge as against the Employer's reaction. CP 580-581. The Examiner notes that the Employer viewed Cherry's emails as "antagonistic," demonstrating the Employer's animus on a protected topic. *See: City of Winlock*, Decision 4784-A (PECB, 1995). However, as the Examiner concluded, an antagonistic approach does not make the emails unreasonable in the context of labor relations, which is invariably and inherently adversarial to some degree. Again, the State apparently takes no issue with these conclusions.

The Department discriminated against Cherry based on her protected activities. The Employer overreacted to the situation and

imposed discipline that was improper, even under its own policies. CP 506-507. The conclusion of discrimination is supported by the Employer's long delay in restoring internet access. *Decision at 16.* As the Examiner concluded:

> The Employer failed to explain why it did not take prompt action to restore Cherry's rights. By its choice of punishment and slack pace of resolution, the employer's conduct is inherently destructive of employee interests.

Id., citing City of Omak, Decision 5579-B (PECB, 1998). These findings are not even addressed by the Commission.

7. The Examiner's Conclusion Regarding Interference Is Well-Supported By The Record Evidence.

As the Examiner correctly noted, the Employer's actions in this case were reasonably perceived, not only by Cherry but also by other employees, as impairing collective bargaining rights and their ability to communicate with their steward. CP 510, 604-607, 613-615. The Department's decision to reprimand Cherry and deprive her of internet access sent a clear message to all employees in the bargaining unit about the consequences of challenging management with respect to protected topics, and that message was received. *Id.*

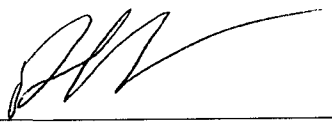
III. CONCLUSION

The Department of Corrections deprived Cherry of internet access and issued her a letter of reprimand for engaging in protected activity by challenging management's authority in two emails relating to the hiring of a victim advocate and a mandatory training program. The Examiner recognized these violations for what they were: an effort to put Cherry's advocacy as a union activist in check and send a message to bargaining unit employees. Rather than upholding this well-reasoned decision, the Commission overturned it, holding that Cherry's emails were unprotected because concerted activity is not protected by the statute unless it is linked to union activity such as contract administration or negotiation. This conclusion is incorrect as a matter of law, and in any event the overwhelming weight of evidence in the record establishes that Cherry's email communications (and the employer's reaction) were closely linked to her role as shop steward and were part of her effort to assist Local 117. Public employees in Washington State must have a security in knowing that their rights to self-organize and bargain collectively are not only protected by statute, but enforced, irrespective of any nexus to union activity.

For these foregoing reasons, Appellants respectfully request that the Court overturn the Decision of the PERC Commission and reinstate

the Examiner's Findings of Fact, Conclusions of Law and Order in Decision No. 10998.

RESPECTFULLY SUBMITTED this 17th day of September, 2012.



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CERTIFICATE OF SERVICE

I certify that I served, or caused to have served the foregoing BRIEF OF APPELLANT on all parties or their counsel of record by:

X Via Legal Messenger, with courier fees paid, and addressed to:

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Washington State Court of Appeals, Division II
950 Broadway Street, Suite 300
Tacoma, WA 98402

X Via E-mail and by U.S. Mail by First Class Postage Prepaid to:

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FILED
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DIVISION II
2012 SEP 17 PM 4:23
STATE OF WASHINGTON
BY _____
DEPUTY

Under penalty of perjury, under the laws of the State of Washington, the undersigned certifies that the foregoing is true and correct.

DATED this 17th day of September, 2012 at Tukwila, WA.

Meghan J. Allen

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11-2-11257-3 38583303 ORDY 05-25 12

THE HONORABLE LINDA C. J. LEE

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR PIERCE COUNTY

TEAMSTERS LOCAL UNION NO. 117, a Washington State Labor Organinzation, and PHYLLIS CHERRY,

Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT OF CORRECTIONS, Employer, and PUBLIC EMPLOYMENT RELATIONS COMMISION,

Respondents.

NO. 11-2-11257-3

ORDER DENYING PETITION FOR REVIEW

FILED
DEPT 19
IN OPEN COURT
MAY 25 2012
Pierce County Clerk
By

THIS MATTER having come on regularly for hearing on March 23, 2012, before the HONORABLE JUDGE LINDA C.J. LEE of the above-entitled Court upon the Petition for Review of the Public Employment Relations Commission Decision dated June 15, 2011, the Appellant, Teamsters Local Union No. 117 and PHYLLIS CHERRY, and the Respondent, DEPARTMENT OF CORRECTIONS, appearing by and through its attorneys of records, ROBERT M. MCKENNA, Attorney General, and VALERIE B. PETRIE, Senior Counsel, and the Court having heard argument, considered the records and files herein, and being fully advised; now, therefore,

IT IS HEREBY ORDERED that for the reasons stated in the Verbatim Transcript of Proceedings of the Judge's Ruling dated May 11, 2012, attached herein and incorporated by

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reference, the Public Employment Relations Commission's Decision dated June 15, 2011, is hereby affirmed, and the Petition for Review is denied and dismissed.

DATED this 25th day of May, 2012.

JUDGE LINDA C.J. LEE

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Attorney General

VALERIE B. PETRIE
WSBA No. 21126
Senior Counsel

Attorneys for Respondents

FILED
DEPT. 19
IN OPEN COURT
MAY 25 2012
Pierce County Clerk
By
DEPUTY

Approved as to form:

Verbal Approval given 5/22/12

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

TEAMSTERS LOCAL UNION 117, a Washington State labor organization, and PHYLLIS CHERRY, Appellant,	)	
vs.	)	No. 11-2-11257-3
STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS, Employer, and PUBLIC EMPLOYMENT RELATIONS COMMISSION, Respondent.	)	

VERBATIM TRANSCRIPT OF PROCEEDINGS

Judge's Ruling

May 11, 2012
Pierce County Courthouse
Tacoma, Washington
Honorable Linda CJ Lee

Attorney for Appellant - Spencer Nathan Thal

Attorney for Respondent - Valerie Petrie

Jennifer L. McLeod, RPR, CCR No. 2156
Official Court Reporter
Department 3, Superior Court
(253)798-7475

THE COURT: We are now on the record with Teamsters Local Union 117 versus State of Washington Department of Corrections, Cause No. 11-2-11257-3. If I could have everyone on that matter please identify themselves for the record.

MS. PETRIE: My name is Valerie Petrie. I'm here on behalf of the Department of Corrections.

MR. THAL: Spencer Thal with Teamsters Local 117.

THE COURT: And I want to thank the parties for coming back. I believe I owe the parties a ruling after oral argument. I have now had the opportunity to re-review the order and the briefing and as well as the decisions that the parties relied upon, and my ruling is as follows:

The appellant in this matter argues that the commission erred in concluding that the employee's concerted activity is not a protected activity.

Now, RCW 41.80.050 outlines the activities that are protected which include the right to, one, self-organize; two, join, form or assist employee organizations; and three, bargain collectively through representatives of their own choosing for the purpose of collective bargaining free from interference, restraint or coercion.

In the Commission's order finding that Ms. Cherry was not engaged in protected union activity as outlined in RCW 41.80.050 is supported by the record.

The mere fact that a person is a shop steward does not make all activity engaged in by that person protected activity. The activity must still fall within one of the categories enumerated in the statute.

Here it is argued that the e-mails are an attempt to self-organize because "When employees engage in concerted activity by communicating with other employees on issues of concern regarding working conditions, the activity is an expression of the right to self-organize in that such dialogue builds employee solidarity and thereby strengthens the bargaining unit as against the employer interests." And that is from the appellant's brief.

Let me break the citation down. The fundamental flaw with that argument is that these employees that are before this court are already organized. These e-mails were not and cannot be characterized, given their contents, as an attempt to self-organize.

Furthermore, there's no evidence in the record to establish and nor do the contents of the e-mails lend themselves to the conclusion that they were sent in relation to matters that were being discussed or in anticipation of being discussed by the union and its members or in relation to matters dealing with any negotiations or preparation for negotiation of the collective bargaining agreement.

Moreover, it is probative that Ms. Cherry herself

stated that the e-mails were not union business or union related.

The statute sets forth specific protected activity. Here there is no evidence to support the assertion that Ms. Cherry's actions in sending the two e-mails were in relation to her representing or advocating for an employee as a shop steward; that the e-mails were related to negotiations of preparation for negotiations between the union and the employer; or that the e-mails related to matters discussed between the union and the employer or in anticipation of discussions by the union with the employer.

The appellant also argues that the Commission erred as a matter of law by concluding that the employee's "concerted activity" is not protected unless it is related to the rights conferred under the state's collective bargaining statute. I believe appellant argued that the state's statute does not -- or the appellant agrees that the state's statute does not use the term "concerted activities" in the findings of scope of protected activities for employees.

However, the appellant argues that such a time should be read into the statute and that the Court should reverse the Commission's decision and "Hold the RCW 41.80.050 does not deprive employees of protection simply

because the activity is not connected to union activity." That is found on page 9 of the appellant's brief at lines 12 to 15.

The appellant relies on the National Labor Relations Act and decisions pursuant to that act in support of its position. The Court declines the invitation to read the term "concerted activity" into RCW 41.80.050 as requested by the appellant.

Our state legislature passed a statute without such a term, nor has our legislature seen it fit to amend the statute by adding such a term, and this Court will not invade the province of the legislature by adding a term it has seen fit not to include.

Also, it strikes this Court that the appellant's argument places the statute on its head. The appellant argues that the Court should hold that RCW 41.80.050 does not deprive the employees of protection simply because the activity is not connected to union activity. In other words, any activity by an employee must be protected because whether the activity is related or connected to the union activity or not, it should be protected. If that's the case, why have the statute at all, because all employees would be afforded protection for any activity. Period. To me that seems illogical.

For example, if that position was adopted and

Ms. Cherry, just as an example, decided she did not like a certain co-worker and Ms. Cherry starts to send out information via e-mail on the employer's system and digs up all kinds of information on the Internet on her work computer about that particular co-worker and starts to disseminate all of that info via e-mail on the work computer that she has found, some of which may be private or sensitive, some of which may not even be accurate because it's false information about someone else, but Ms. Cherry believes it relates to this particular co-worker, according to the position that is being advocated by the appellant, this would be protected activity and the Department of Corrections would not be able to take any action against Ms. Cherry. So that's just one of the problems that the Court saw with the position taken by the appellant.

But regardless, that's just one of the possible scenarios under the position that the appellant asks this Court to adopt. It could be a logical conclusion if you take the position to its logical end.

So as stated, this Court will not be reading into the statute a term that is absent, and the Commissioner's order is affirmed.

MS. PETRIE: Thank you, Your Honor.

THE COURT: I don't suppose someone has an order for me.

MS. PETRIE: I do have an order. Now I'm afraid after the last hearing it's not specific enough. It's a pretty standard order. Do you want to look at it, Spencer?

THE COURT: Does it have written findings pursuant to RALJ 9.1?

MS. PETRIE: I can do that.

THE COURT: Why don't we set a presentation date to allow the parties to try to work out or at least the opportunity to argue if they can't work out some written findings.

MR. THAL: Why is this not adequate?

MS. PETRIE: Because the RALJ rules require specific findings and conclusions in the order.

THE COURT: RALJ 9.1G: "The reasons for the decision shall be stated." It's a shall. RALJ 9.1G. So why don't we set a date.

MS. PETRIE: Okay.

THE COURT: How long do the parties wish to have on this matter?

MS. PETRIE: I could probably do it in a couple weeks or maybe could we set it the same day as the other presentation, June 15.

THE COURT: Would that work for your schedule?

MR. THAL: What if we just said for the reasons stated in the transcript.

THE COURT: Then you'd have to order out the transcript and clip it to the order. And that's acceptable as well. You don't have to make written findings.

MR. THAL: I'd rather not re-articulate your reasoning.

MS. PETRIE: That's fine, if that's acceptable to the Court.

THE COURT: That's written findings. Let's set it for June 15. And if you folks present something to the court before then you can both agree on, we will strike the 15th date if you can give it to me beforehand. You don't have to show up on the 15th.

MS. PETRIE: All right. That's great. Thank you.

THE COURT: So we'll set this for June 15th.

MS. PETRIE: 9 o'clock?

THE COURT: Yes.

MS. PETRIE: Thank you.

THE COURT: And I thank both sides for your patience in this matter.

(Proceedings concluded.)

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

REPORTER'S CERTIFICATE

State of Washington)
)
County of Pierce)

I, Jennifer L. McLeod, Official Court Reporter in the State of Washington, County of Pierce, do hereby certify that the foregoing transcript is a full, true, and accurate transcript of the proceedings and testimony taken in the matter of the above-entitled cause.

Dated the _____ day of _____, 2012.

Jennifer L. McLeod, RPR, CCR
Official Court Reporter
CCR No. 2156